BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENDA F. WRIGHT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,851
J. C. PENNEY CO., INC.	)	
Respondent	)	
Self-Insured		

ORDER

Respondent appeals the July 31, 2003 Award of Administrative Law Judge Robert H. Foerschler. Claimant was awarded a 78.5 percent permanent partial general disability for injuries suffered through a series of injuries beginning November 8, 2001, and continuing thereafter. Respondent contends claimant should be limited either to her functional impairment or to a substantially reduced work disability, as claimant was offered a job at a comparable wage which claimant refused to attempt. Additionally, claimant was offered a second job, although respondent acknowledges the second job offer was at a wage not comparable to that which claimant was earning at the time of the accident. This would still entitle claimant to a work disability, but would reduce her permanent partial general disability award substantially. Respondent argues that the treating physician, board certified orthopedic surgeon William O. Reed, Jr., M.D., found claimant had suffered no loss of task performing abilities and, therefore, claimant's permanent partial general disability should be reduced accordingly.

Claimant argues that her refusal to accept the jobs was justified, as the jobs offered by respondent violated restrictions placed upon her by board certified orthopedic surgeon Edward J. Prostic, M.D. The Appeals Board (Board) heard oral argument on January 27, 2004.

APPEARANCES

Claimant appeared by her attorneys, C. Albert Herdoiza of Kansas City, Kansas, and Gary P. Kessler of Kansas City, Kansas. Respondent appeared by its attorney, William G. Belden of Prairie Village, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, at oral argument, the parties agreed that the average weekly wage determined by the Administrative Law Judge in the Award was appropriate and that issue was, therefore, no longer before the Board. The Board affirms the Administrative Law Judge's determination that claimant has a $532 base average weekly wage, with fringe benefits of $48.65 for hospital insurance and $10.64 for claimant's 401(k) contributions, for a total average weekly wage of $591.29. Additionally, the parties have stipulated that the fringe benefit package became part of the average weekly wage as of November 1, 2002, the date when the fringe benefits were no longer being provided by respondent.[1] The parties also stipulated at oral argument that the appropriate ending date for claimant's series of accidental injuries was March 14, 2002, the last day claimant worked before her March 15, 2002 surgery with Dr. Reed.

ISSUES

(1) What is the nature and extent of claimant's injury and disability?

(2) Is claimant entitled to unauthorized medical care?

(3) Is claimant entitled to future medical care?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent for over 15 years as an alteration order filler in the tailor shop. Her job involved using sewing machines, measuring, cutting, pressing and packaging items. Beginning in November of 2001, claimant began noticing tingling in her hands and also swelling, aching and cramping. Claimant went to respondent's medical department and was initially advised to go to her own doctor. Claimant went to her personal physician, Reddy Katta, M.D., at Orthopedic Professional Associates, who was already treating her for a non-work-related motor vehicle accident. Dr. Katta diagnosed bilateral hand problems and referred claimant to Dr. Appelbaum, who did nerve conduction studies, diagnosing bilateral carpal tunnel syndrome. Claimant provided the results of the test to her employer and was referred to William O. Reed, Jr., M.D.

[1] K.S.A. 2001 Supp. 44-511.

Dr. Reed initially attempted conservative care, including injections in both hands. When those conservative treatments proved unsuccessful, Dr. Reed recommended, and claimant agreed to undergo, surgery. Dr. Reed performed carpal tunnel surgery on claimant's right wrist on March 15, 2002, and on her left wrist on May 3, 2002.

Claimant was returned to respondent's employment with restrictions in June of 2002. Respondent put her in the "returns department." However, that job involved gripping, pulling and grabbing, which exceeded claimant's restrictions and caused her to develop additional problems. Claimant advised respondent of her difficulties and she was removed from that job. Claimant was off work until July 3, 2002, when she was given a job in the medical department. That job, which paid a comparable wage to that which claimant was earning at the time of the accident, involved filing, answering the phone, supervising and controlling the lobby, and delivering information. Claimant reported no difficulties in performing that work. Her supervisor, respondent's medical manager Virginia E. Sewing, testified that claimant was a very good employee, who performed the job duties without complaint. Ms. Sewing also testified that claimant had advised her that she was enrolled in a junior college because she was not planning to work in a warehouse setting all of her life. Claimant worked that job until October 22, 2002, at which time the job was eliminated due to a lack of work.

Claimant was then provided the opportunity to work at three different jobs with respondent. Claimant was offered a job identified as detail check in the store support center (SSC). Claimant rejected that job, as it involved holding a 5- to 10-pound scanner in one hand and grabbing garments in her other hand. It was a repetitive job and required using a keyboard. Claimant testified she had no typing skills.

A second job offer to claimant involved typing and required that claimant qualify at 30 words per minute. When claimant took the typing test, she was unable to perform that job, as she could only qualify at 11 words per minute. A third job offer to claimant was described as detail assistant, which Horace L. Smith, respondent's employment and personnel relations manager, described as involving duties similar to those in the medical department. He did acknowledge, however, that it included some keying into the computer, although how much was not quantified. The second position, the typing job, paid at a comparable wage to that which claimant was earning for respondent. The positions of detail check and detail assistant, however, while providing the same fringe benefits, only paid $10.38 and $10.94 an hour, respectively, which was a substantial reduction from the $13.30 per hour claimant was earning in her original position. These, when compared to her original average weekly wage, represented a 20 percent loss of wage earnings.

Mr. Smith testified that claimant refused to accept the detail assistant job, as it paid less than her original position. Claimant denies making that comment to Mr. Smith,

testifying that her rejection of that job was because of the requirement that there be information typed into a computer.

Claimant was then laid off from her employment, with her actual termination date from respondent occurring on April 25, 2003.

Since leaving respondent's employment, claimant has been searching for work. She received a substantial amount of unemployment compensation and continued her job search, satisfying the unemployment requirements. Claimant testified she was looking for a receptionist, office type work and provided a substantial list of contacts, including customer service and receptionist type positions. Her goal was to look at at least four places per week. Claimant was asked why, when her past experience involved retail sales, particularly at Wal-Mart, she did not attempt to try to locate that type of job. Claimant provided no reason, stating simply that she had not applied at any location for a retail sales position.

Claimant was examined and treated by William O. Reed, Jr., M.D., who diagnosed and treated her bilateral carpal tunnel syndrome with surgeries to each wrist. Dr. Reed assessed claimant a 7 percent impairment to each upper extremity, which converts to an 8 percent whole person impairment based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Reed was provided a detailed task analysis, generated by vocational expert Michael Dreiling. In Dr. Reed's opinion, he did not believe claimant was prohibited from performing any of the tasks on that list. Therefore, claimant had a task loss of zero percent. By the time claimant last visited Dr. Reed in November 2002, she was doing well, although she did have symptoms of tendinitis.

Claimant was referred by her attorney to orthopedic surgeon Edward J. Prostic, M.D., for an examination on November 6, 2002. Dr. Prostic confirmed the diagnosis of bilateral carpal tunnel syndrome, opining at the time of his deposition that claimant was not in need of any additional treatment. He assessed claimant a 12 percent impairment to each upper extremity, which combined to a 14 percent impairment to the body as a whole, all pursuant to the AMA *Guides* (4th ed.). Dr. Prostic restricted claimant from forceful or repetitious gripping with either hand. He also recommended she not do sustained forceful gripping of more than 10 pounds for more than a minute at a time and more than six times per hour. He also recommended that she avoid "a lot of keypunching or handwriting or fine manipulation with either hand."[2] However, on cross-examination, Dr. Prostic recommended that claimant "shouldn't be doing constant handwriting or

[2] Prostic Depo. at 14.

constant keying."[3] Dr. Prostic reviewed the task list of Mr. Dreiling, opining claimant was unable to perform six of the nine tasks, for a 67 percent task loss. While tasks 3 and 4 were discussed with Mr. Dreiling at his deposition and whether they could be combined, all Mr. Dreiling was willing to say was that that combination was possible, but it was never actually determined that that combination of the two tasks should occur. The Board, therefore, will utilize the entire nine-task list created by Mr. Dreiling in assessing claimant's task loss.[4]

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[5]

It is the function of the trier of fact to determine which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[6]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[7]

Claimant was assessed a 14 percent impairment to the body as a whole for her bilateral upper extremity conditions by Dr. Prostic and an 8 percent impairment to the whole body for her bilateral carpal tunnel conditions by Dr. Reed. Both opinions were based upon the AMA *Guides* (4th ed.). The Board finds neither opinion to be sufficiently persuasive to allow the Board to reject the other and, therefore, finds, in comparing the two, that claimant has suffered an 11 percent impairment to the body as a whole for the injuries suffered to her bilateral upper extremities on a functional basis.

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[3] Id. at 27-28.

[4] K.S.A. 44-510e.

[5] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[6] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[7] K.S.A. 44-510e(a).

K.S.A. 44-510e goes on to define work disability as:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[8]

Two task loss opinions were placed into the record. Dr. Prostic opined claimant had lost the ability to perform six of nine tasks from the task list of Mr. Dreiling. Dr. Reed, claimant's treating physician, found claimant would not be prohibited from performing any of the tasks on the list. However, the Board, in reviewing the list, notes several of those activities involve repetitive, hand-intensive activities. This is the same type of activity which caused claimant to develop problems in the first place. The Board, therefore, finds the opinion of Dr. Prostic, that claimant has a 67 percent loss of task performing abilities, to be the most persuasive and adopts same. The Board acknowledges there was some discussion in the record regarding whether Mr. Dreiling's list should be reduced from nine to eight, with the combination of tasks 3 and 4. However, Dr. Prostic did not testify to that fact, and Mr. Dreiling, when asked, was only willing to state that that combination was possible, but did not go so far as to accept the suggested combination of tasks. Therefore, the opinion Dr. Prostic, based upon the nine-task list of Mr. Dreiling, is accepted by the Board.

With regard to whether claimant has suffered a loss of wages under K.S.A. 44-510e, the Board must consider the language of the statute in light of *Foulk*[9] and *Copeland.*[10] In *Foulk*, the Kansas Court of Appeals determined that a claimant could not be eligible to receive work disability when a claimant fails to attempt to perform a job that is within the claimant's abilities. In this case, claimant refused to attempt to perform jobs which were offered by respondent. The Board acknowledges that the job of detail check, which involved handling 5- to 10-pound weights and repetitive hand motions, appears to exceed the restrictions placed upon claimant by Dr. Prostic. The Board, therefore, believes claimant's decision to reject that job to be appropriate.

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[8] K.S.A. 44-510e(a).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

However, claimant was offered a job titled detail assistant, which involved basically the same activities that claimant had performed in the medical department, with some additional keyboarding involved. Dr. Reed did not restrict claimant from keyboarding. Dr. Prostic, claimant's examining doctor, discussed claimant's keyboarding activities on two occasions. At one place in his deposition, he recommended claimant not do "a lot of keypunching or handwriting or fine manipulation."[11] At another place in his deposition, he cautioned that claimant shouldn't be doing "constant handwriting or constant keying."[12]

Neither of these cautions by Dr. Prostic prohibit claimant from keyboarding. They simply prohibit the excessive or constant keyboarding, which appeared to be Dr. Prostic's concern. The Board finds that the activities involved in the detail assistant job appear to fall within the restrictions placed upon claimant by Dr. Prostic and most certainly fall within the restrictions placed upon claimant by Dr. Reed.

Claimant argues that Dr. Prostic reviewed the job description of the jobs offered to claimant and rejected those as being too hand intensive. However, a review of Dr. Prostic's deposition indicates that, while he was described the job of detail check, there is no indication in the record that he was described the detail assistant position. The Board agrees that Dr. Prostic rejected the detail check job as being too intensive. However, the Board finds claimant's refusal to attempt the detail assistant job violates the policies set forth by the Kansas Court of Appeals in *Foulk* and *Copeland*, and the Board will, therefore, impute to claimant the wage of $10.94 per hour, as was offered in association with the detail assistant job. This results in a loss of wages of 18 percent.

When combining claimant's 67 percent task loss with her 18 percent wage loss, the Board finds claimant is entitled to a permanent partial general disability of 42.5 percent.

The Board, therefore, finds that the Award of the Administrative Law Judge of July 31, 2003, should be modified to grant claimant a 42.5 percent permanent partial general disability to the body as a whole for the injuries suffered in a series from November 8, 2001, through March 14, 2002.

The parties have stipulated that claimant was paid a total of $4,456.56 in temporary total disability compensation. However, the specific number of weeks and the rate at which it was paid were not specified. The Board can only assume as claimant's surgeries were performed in March and May of 2002, prior to the cessation of the fringe benefits, that the temporary total disability compensation was or should have been paid at the lower rate of $354.68 per week. This equates to 12.57 weeks temporary total disability compensation.

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[11] Prostic Depo. at 14.

[12] Id. at 27-28.

It is suggested that in the future, the parties stipulate not only to the total amounts paid as temporary total disability, but also to the numbers of weeks and the specific dates of temporary total disability payments, especially in a situation such as this where the inclusion of the fringe benefits on November 1, 2002, substantially raises claimant's average weekly wage.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 31, 2003, should be, and is hereby, modified to grant claimant an award for an 11 percent permanent partial general disability, followed by an award of 42.5 percent to the body as a whole for the injuries suffered in a series through March 14, 2002, and based upon an average weekly wage of $532 per week base wage, with fringe benefits of $59.29, totaling $591.29.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Glenda F. Wright, and against the respondent, J.C. Penney Company, Inc., a self-insured, for an accidental injury which occurred on March 14, 2002, and based upon an average weekly wage of $532 through October 31, 2002, and $591.29 beginning November 1, 2002, for 12.57 weeks of temporary total disability compensation at the rate of $354.68 per week totaling $4,456.56, followed by 19.14 weeks of permanent partial disability compensation at the rate of $354.68 per week totaling $6,790.34 for an 11 percent permanent partial general disability, followed by 1.29 weeks of permanent partial disability compensation at the rate of $354.68 per week representing the period from October 23, 2002, through October 31, 2002, totaling $457.54, and 155.95 weeks permanent partial disability compensation at the rate of $394.21 per week beginning November 1, 2002, totaling $61,477.05 for a 42.5 percent permanent partial general disability, for a total award of $73,181.49.

As of February 19, 2004, claimant is entitled 12.57 weeks of temporary total disability compensation at the rate of $354.68 per week totaling $4,456.56, followed thereafter by 20.43 weeks of permanent partial disability compensation at the rate of $354.68 per week totaling $7,247.88, followed by 67.86 weeks of permanent partial disability compensation at the rate of $394.21 per week totaling $26,751.09, for a total due and owing of $38,455.53, which is ordered paid in one lump sum minus any amounts previously paid. As of February 20, 2004, claimant is entitled to an additional 88.09 weeks permanent partial disability compensation at the rate of $394.21 per week, for a total of $34,725.96, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Gary P. Kessler, Attorney for Claimant
William G. Belden, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director